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No. 14-981

In the

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

vs.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF CALIFORNIA INSTITUTE OF TECHNOLOGY, CARNEGIE MELLON UNIVERSITY, CASE WESTERN RESERVE UNIVERSITY, EMORY UNIVERSITY, GEORGE WASHINGTON UNIVERSITY, NORTHWESTERN UNIVERSITY, RICE UNIVERSITY, TULANE UNIVERSITY, UNIVERSITY OF ROCHESTER AND WASHINGTON UNIVERSITY IN ST. LOUIS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

Pursuant to Supreme Court Rule 37, this brief is submitted in support of Respondents on behalf of amici curiae California Institute of Technology, Carnegie Mellon University, Case Western Reserve University, Emory University, George Washington University, Northwestern University, Rice University, Tulane University, University of Rochester and Washington University in St. Louis. Amici are among the most selective, well-regarded private research universities in the country, with strong undergraduate and graduate programs in the sciences, technology, engineering, and mathematics fields.

As educators, amici believe that substantive diversity, both within their student bodies as a whole and across all academic programs and disciplines, is essential to fulfilling their academic mission to provide the best education to their students, who are future leaders in their communities, the nation and the world. Diversity of perspectives, backgrounds, socioeconomic status, race, and ethnicity, among other characteristics, creates a dynamic campus life that benefits all students and the universities as educational institutions. This dynamic educational experience is at the foundation of American higher education's sustained success, and a main reason that

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[1] The parties have filed with the Court their blanket consent for the filing of amicus curiae briefs in these cases. Pursuant to Supreme Court Rule 37.6, counsel for amici curiae certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

amici attract some of the finest students from around the world. Diversity within the university community also prepares students for life in a society of increasingly global dimension. Preparing students to succeed in an ever more competitive global economy—in which they will encounter and interact with persons of diverse races, ethnicities, and cultural backgrounds—is a core educational value of amici and is essential to the continued security and economic success of the United States.

Amici, as private institutions, seek in their undergraduate admissions processes to achieve a broad range of diversity throughout their academic programs. Undergraduate admission at amici is highly competitive, with many more well-qualified candidates applying than can be accepted. Amici undertake a holistic and individualized review of each candidate, which takes into account many factors, of which race is only one, in order to determine how such candidates might contribute to the learning environment and to the accomplishment of each university's educational goals. The inability to take into consideration this factor among the many other factors that universities consider, including socioeconomic status, extracurricular interests, personal achievements and talents, hardships overcome and first-generation college attendance, would provide an incomplete picture of the applicant.

Because this Court's holding—with respect to the constitutional parameters of using race as a factor in an individualized assessment of university applicants—could later impact the admissions process at private colleges and universities under Title VI of the

Civil Rights Act of 1964, amici have a considerable interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

I. Student body diversity is an essential element in the respective educational missions of amici, and a critical component of amici's efforts to give their students the best educational experience and to prepare them for a diverse and globally integrated world. Accordingly, amici have developed flexible and holistic admissions policies that consider a number of factors, including race, in order to achieve substantive and qualitative educational diversity both within their student bodies as a whole, and also within specific disciplines, programs and areas of study. Admissions officers at amici universities conduct detailed and in-depth reviews of each application in order to evaluate potential students as individuals, and devote substantial time and expense in order to understand the applicant and how the individual would contribute to the university. Moreover, as private research universities, amici have a particularly compelling interest as part of their educational missions in fostering diversity among their student bodies in the fields of science, technology, engineering, and mathematics, where people of color and women have been significantly underrepresented.

A rigid numerical measure, such as the Top 10% Law (the "Percent Plan") used at Respondent University of Texas at Austin ("UT Austin"), is not a workable method for student admissions at amici to achieve diversity, including racial diversity. Amici's small size and status as private institutions, as well

as their focus on national and international outreach for prospective students, do not allow amici to offer admission to students based solely on high school rank, and instead necessitate the use of holistic review admissions practices that include race and ethnicity as one of many factors in order to produce the qualitatively, substantively diverse class that amici strive to create in order to accomplish their educational goals.

II. It has long been the judgment of this Court that student body diversity, including racial diversity, is a compelling objective for educational institutions, and universities may utilize appropriately narrowly tailored means to achieve it. While workable race-neutral approaches are part of the admissions toolkit for universities, amici have found that such race-neutral efforts alone do not provide the level of diversity necessary to further their educational goals. Precluding universities from considering race as one factor among many in crafting a diverse class would unduly restrict amici from considering each applicant's individuality and unique experiences, which is necessary to create a student body that is diverse across academic, socioeconomic, racial, cultural, and experiential lines.

I.

PRIVATE UNIVERSITIES LIKE AMICI HAVE A COMPELLING INTEREST IN ACHIEVING A DIVERSE STUDENT BODY BY EMPLOYING A HOLISTIC, INDIVIDUALIZED ADMISSIONS PROCESS, WHICH IMPROVES THE EDUCATIONAL EXPERIENCE FOR ALL STUDENTS

A. Creating, Preserving And Promoting Diversity Within The Student Body As A Whole Is Critical For The Achievement Of The Educational Missions Of Amici

Based on their experience, amici have concluded that diversity within their student bodies is essential to accomplishing their educational missions. Accordingly, amici have developed flexible and holistic admissions policies that, through an individualized review of each application, give consideration to numerous factors, including race, in order to create and nourish a student body that is substantively diverse.

Importantly, and as the Court recognized in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) ("*Bakke*"), *Grutter v. Bollinger*, 539 U.S. 306 (2003) ("*Grutter*") and *Fisher v. University of Texas at Austin*, 570 U.S. ---, 133 S. Ct. 2411 (2013) ("*Fisher I*"), the benefits of diversity accrue to all students, not only minority students. A robustly diverse environment both enhances students' experience while at the university and better prepares them for success in the world beyond. Through discourse and interactions in a broadly diverse community, students learn and develop the pluralistic skills that are

essential for success in today's global marketplace, including conflict negotiation and leadership skills.[2]

The exchange of differing viewpoints, which originates in the first instance from students' distinct backgrounds and experiences, is a foundational value of American universities. That exchange, and the dynamic environment it creates, has made the American higher education system an exemplar for the world. This Court's decisions rightly recognize the genuine "educational benefits [that] flow from student body diversity," *Grutter*, 539 U.S. at 330, and that an educational institution therefore "may consider it a compelling interest to achieve a diverse student population." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797-98 (2007) (Kennedy, J., concurring). The Court also has underscored that the benefits of rigorous promotion and enhancement of diversity at the university level are "not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints." *Grutter*, 539 U.S. at 330.

Facilitating interaction between students of diverse viewpoints and experiences is a fundamental educational goal of most American universities, including amici. As set forth in amicus Rice University's Mission Statement, "As a leading

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[2] *See* Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615 (2008).

research university with a distinctive commitment to undergraduate education, Rice University aspires to pathbreaking research, unsurpassed teaching, and contributions to the betterment of our world. It seeks to fulfill this mission by cultivating a diverse community of learning and discovery that produces leaders across the spectrum of human endeavor."[3] Similarly, amicus Carnegie Mellon "strives to prepare its students for life-long learning and impact through scholarship, innovation, creativity, entrepreneurship and service. We bring diverse people together to produce diverse solutions in new and unique ways at the crossroads of intellectual disciplines."[4]

Likewise, amicus Northwestern University believes a diverse community is essential to its mission "because only by exploring issues with people of different backgrounds and viewpoints can we challenge our assumptions, test our ideas and broaden our understanding of the world."[5] At amicus George Washington University, "[t]he overriding theme that has framed diversity and inclusion efforts and activities ... is the reality that diversity and academic excellence go hand-in-hand. They are mutually reinforcing objectives. Diversity concerns embody a

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[3] *Mission Statement for Rice University*, http://www.professor.rice.edu/professor/Mission_Statement.asp (last visited Oct. 29, 2015).

[4] President Subra Suresh, Carnegie Mellon, *The Leadership of Carnegie Mellon University*, http://www.cmu.edu/leadership/president-suresh/ (last visited Oct. 29, 2015).

[5] President Morton Schapiro and Provost Daniel Linzer, Northwestern University, *Statement from the President and Provost* (2015), http://www.northwestern.edu/diversity/leadership-commitment.html (last visited Oct. 29, 2015).

range of moral, legal, and cultural issues. The objective of our university when it comes to diversity and inclusion is to enhance the academic excellence of GW by making it a more diverse and inclusive community."[6]

Washington University in St. Louis likewise holds diversity to be a key objective to its educational goals: "Universities excel when we attract talent and create an environment where that talent thrives. Universities create knowledge and ideas, and better ideas and decisions come from groups of people with different backgrounds and experiences. For these reasons, it is a key objective of higher education to attract and nurture students, staff and faculty that reflect the served populations and bring the different backgrounds needed to make the world more prosperous and equitable. Washington University welcomes difference on our campus in the form of gender, race, ethnicity, disability, geography, socioeconomic status, age, politics, religion, philosophy, sexual orientation, gender identity or expression and veteran status. We seek to bring these different backgrounds and perspectives to the great problems facing the world. Our goal is for students, staff and faculty members of all backgrounds to thrive. Enhancing diversity at Washington University

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[6] George Washington University, *Diversity and Inclusion at GW*, http://diversity.gwu.edu/diversity-and-inclusion-gw (last visited Oct. 29, 2015).

is the top strategic goal approved by the Board of Trustees...."[7]

Amici's commitment to diversity in their student bodies reflects not only their core educational values, but also their collective experience that a diverse environment enhances learning outcomes. The educational experience of every student is enriched through discussion in classrooms, and interactions on campus and within the university community with people from varied backgrounds with different life experiences. As amicus Carnegie Mellon University President Subra Suresh has observed, "Diversity in the broadest sense—intellectual, cultural, ethnic, racial or national origin—intrinsically enhances artistic and technical innovation. If it is composed of an appropriate mix of people, when a heterogeneous group takes a look at any issue, the members have a much better chance of correcting each other's hidden biases."[8] As another example, amicus University of Rochester has observed that all students benefit as "productive inquiry best takes place when individuals can explore and share their experience and thoughts as equal members of our community, uninhibited by prejudice or discrimination. Thus, our pursuit of excellence requires that we create and support a community of faculty, students and staff who together

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[7] Washington University in St. Louis, *Provost Statement on Diversity*, http://diversity.wustl.edu/mission/provost-statement/ (last visited Oct. 29, 2015).

[8] Mark Roth, *CMU President Subra Suresh Makes the Case for Diversity Pittsburgh's New Immigrants*, http://www.post-gazette.com/newimmigrants/2014/11/23/Pittsburgh-s-New-Immigrants-CMU-president-makes-the-case-for-diversity/stories/201411230008 (last visited Oct. 29, 2015).

and individually enhance diversity and who strive to make themselves and our community ever better."[9]

Moreover, concrete research supports these conclusions and experiences. A University of Michigan study analyzing the relationship between undergraduate students' experiences with diverse peers and their educational outcomes concluded that "diversity experiences would have a positive relationship with the learning outcomes."[10] In particular, the study showed that "informal interactional diversity was especially influential in accounting for higher levels of intellectual engagement and self-assessed academic skills."[11]

In addition to promoting better learning outcomes, a diverse university community better prepares students for success in our increasingly diverse, increasingly global society. It is imperative to the academic mission of amici, which actively recruit and attract students from around the world, that they be able to offer a diverse academic and community experience for their students, in order to prepare them for life outside of the university. This Court has acknowledged that "student body diversity . . . better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Grutter*, 539 U.S. at 330. Amicus

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[9] University of Rochester, *Statement of Educational Philosophy*, http://www.rochester.edu/diversity/reports/policies-2/statement-of-educational-philosphy (last visited Oct. 29, 2015).

[10] Patricia Gurin, et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 351 (2002).

[11] *Ibid.*

Washington University in St. Louis considers it one of the university's principal goals to "educat[e] students to live and work in an increasingly diverse world,"[12] and amicus Emory University has identified the dual goals of ensuring that students are "achieving academic excellence," while also being prepared "for life and work in a global society."[13] In sum, it is the view of amici that substantive, qualitative diversity within the student body is simply indispensable to fulfilling all aspects of their academic mission and their responsibilities to students.

B. Effective Educational Admissions Programs Must Permit Some Evaluation Of Prospective Students On A Substantive, Individualized Basis

This Court's precedents bolster the Fifth Circuit's conclusion on remand that an effective college admissions program cannot rely solely on statistics like class rank or standardized test scores, but must, at a minimum, include a component that permits the consideration of an applicant holistically and as an individual, in order for the program to be able to "operate without reducing itself to a cover for a quota system." *Fisher v. University of Texas at Austin*, 758 F.3d 633, 654 (5th Cir. 2014). The kind of diversity that the Court has recognized as a compelling state interest "encompasses a ... broad[] array of

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[12] Mark S. Wrighton, Washington University, *Chancellor's Statement on Diversity*, http://diversity.wustl.edu/chancellor-statement (last visited Oct. 29, 2015).

[13] Emory University, *College Statement on Diversity*, http://college.emory.edu/home/about/mission.html (last visited Oct. 29, 2015).

qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 315. As the Court explained in *Grutter*, "[t]ruly individualized consideration demands that race be used in a flexible, non-mechanical way." *Grutter*, 539 U.S. at 334. And, though he was critical of the Michigan program, Justice Kennedy agreed that, "[t]o be constitutional, a university's compelling interest in a diverse student body *must be achieved* by a system where individual assessment is safeguarded through the entire process." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting) (emphasis added).

The admissions policies of amici do precisely this. For example, at amicus Rice University, admission "is an individualized and holistic ... process which examines the entirety of an applicant's academic prowess, creativity, motivation, artistic talent, leadership potential and life experiences."[14] At amicus California Institute of Technology ("Caltech"), "[i]nstead of simply putting your grades and test scores into a computer to calculate admissibility, we read every application—and every essay—to get a sense of who you are and whether you would be a good fit at Caltech."[15] Amicus Emory University explains that, in its search for "outstanding students . . . [t]hings such as curriculum, grades, and test scores are important[,] but so too are the personal attributes

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[14] Rice University, *Apply: Rice University Undergraduate Admission Policy*, http://futureowls.rice.edu/futureowls/Apply.asp (last visited Oct. 29, 2015).

[15] Caltech, *Admissions Process for First-Year Applicants*, https://www.admissions.caltech.edu/content/admissions-process-first-year-applicants (last visited Oct. 29, 2015).

of the students we select. We are looking for students who are engaged in their communities but curious about what lies beyond their hometown. We want students who aspire to be lifelong learners, with an Emory education only being the first step."[16] To achieve this end, Emory "strives to provide a welcoming, diverse and inclusive campus as an essential part of a community of academic excellence."[17] At amicus George Washington University, admissions are "holistic and thoughtful, taking many factors into consideration."[18] Amicus University of Rochester bases its admissions decisions on a wide variety of factors, including "high school work, recommendations . . . participation and leadership in school and community life, verbal and analytical skills, outstanding achievements and talents [and] unique contributions to the residential college environment.[19]

By contrast, Petitioner argues for a rule that, insofar as diversity is concerned, looks no further than an applicant's race.[20] The Fifth Circuit was correct to

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[16] Emory University, *Apply*, http://apply.emory.edu/apply/ (last visited Oct. 29, 2015).

[17] Emory University, *Diversity*, http://www.emory.edu/home/life/diversity.html (last visited Oct. 29, 2015).

[18] George Washington University, *Undergraduate Admissions & Aid*, http://undergraduate.admissions.gwu.edu/inside-admissions (last visited Oct. 29, 2015).

[19] University of Rochester, *Undergraduate Admissions Policies & Procedures*, https://www.rochester.edu/bulletin/policies/admissions/undergrad/ (last visited Oct. 29, 2015).

[20] *See* Pet. Br. 23, 24. Petitioner does not disclose what percentage she believes is the minimum diversity quotient, but only claims that the Percent Plan has resulted in University of

reject Petitioner's efforts to reduce the creation of academic diversity to a "head count by skin color." *Fisher v. University of Texas at Austin*, 758 F.3d 633, 656 (5th Cir. 2014). As the Fifth Circuit Court correctly concluded, Petitioner's reliance on the Percent Plan alone impermissibly reduces students to simple representatives of a race and treats diversity as merely a question of whether students of a particular race have reached a minimum threshold. *Id.* ("Fisher points to the numbers and nothing more in arguing that race-conscious admissions were no longer necessary because a 'critical mass' of minority students had been achieved by the time Fisher applied for admission—a head count by skin color or surname that is not the diversity envisioned by *Bakke* and a measure it rejected."). This is antithetical to the individualized evaluation of students required by this Court in *Bakke* and *Grutter*. True diversity requires, as this Court's precedent provides and amici's experience proves, that students be assessed individually based on their likely contribution to the university's academic mission. Individualized evaluation promotes the qualitative, substantive diversity that holistic admissions policies which consider race as one of many factors—such as amici's policies—strive to achieve.

The Percent Plan and similar numeric criteria are no guarantee of genuine, substantive, qualitative diversity, even when the students admitted under

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Texas being "one of the most diverse public universities in the country." She asserts that "[once] 'that' level of diversity was achieved"—whatever "that" may refer to—UT Austin should only have resort to race-neutral means such as outreach or "socioeconomic preferences." *Id.* at 24.

those criteria are, in the aggregate, racially diverse. Such numerical criteria can produce a student body in which admitted students of one race are not diverse from one another in terms of other characteristics. They might, for example, be overwhelmingly female (or male) or overwhelmingly of the same socioeconomic background.[21] Moreover, due either to statistical anomalies or common backgrounds, students of a particular minority group admitted under a formulaic process might be unduly concentrated in certain academic interests, leaving individual departments, schools, or colleges within the university lacking diversity among their students.

Ultimately, bald numerical statistics about applicants, without more, simply do not provide enough information about an individual to serve as the sole, or even primary, admissions criteria. In fact, in amicus George Washington University's experience, standardized test scores are considered so limited in what they can reveal about an applicant that the University recently has done away with the requirement altogether. As a result, students applying to George Washington University for the 2016-17 school year now "will have the option to include standardized test scores as part of their application. High school coursework and grades will continue to be the most important factors in GW's holistic review process, along with a student's writing

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[21] In 2004, for example, 80% of the valedictorians in Boston public schools were girls. Anand Vaishnav, *Lopsided at the Top, Girls Outnumber the Boys Among Valedictorians*, Boston Globe, June 6, 2004, *available at* http://www.boston.com/news/education/k_12/articles/2004/06/06/lopsided_at_the_top/?page=full (last visited Oct. 29, 2015).

skills, recommendations, involvement in school and community, and personal qualities and character. [T]his year, students who do not think their SAT or ACT scores are an accurate reflection of their academic potential can choose not to submit them."[22]

C. In Order To Effectively Determine How Each Individual Might Contribute To The Academic Mission, Amici Must Consider Applicants Holistically—Including Their Experience, Academic Interests, Socioeconomic Status And Race—When Making Admissions Decisions

While amici share UT Austin's commitment to diversity, the schools differ in how they evaluate the way individual candidates will contribute to their academic and societal mission. Amici and UT Austin agree that diversity within the student body, including racial diversity, is critical to providing students the best educational experience and preparing them for a diverse and globally integrated world. Among different universities, diversity may take somewhat distinct forms, and different universities will evaluate a student's qualities and experiences differently, depending on the university's unique character, its determination of its own educational goals and mission and how diversity will meet and serve those goals and mission. The kind of student body diversity that a particular school seeks will depend on factors such as its size, geographic

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[22] GWToday, "Standardized Test Scores Will Be Optional for GW Applicants," July 27, 2015, *available at* http://gwtoday.gwu.edu/standardized-test-scores-will-be-optional-gw-applicants (last visited Oct. 29, 2015).

location or historical affiliations, and the nature and relative strengths of its academic programs. Within their schools' unique priorities, admissions officers must also consider the composition of the particular class to ensure that there are a wide range of matriculants of all types and academic interests to enrich the learning environment and improve the quality of education for all students.

While amici agree that racial and ethnic diversity is an important part of overall educational diversity, and consider such diversity in their admissions decisions, race and ethnicity are only two of many factors in the construction of the academic community. When making admissions decisions, amici universities also consider, among other characteristics, academic interests, diversity of background, socioeconomic status, personal accomplishments and geographical distribution. No single characteristic is dispositive for admission.

That amici take the race of applicants into account in selecting their incoming student bodies does not mean that amici systematically favor or advantage one or more races over others. Rather, the race of an applicant is considered as one factor among many to determine the contribution that student would likely make to the university community. For example, a white student from a majority-minority high school might write an essay that illustrates how her or his combination of race and experience would make a particularly interesting addition to the dialogue on campus. The race of an applicant may place into context the applicant's other experiences or characteristics, and suggest whether the candidate will make a valuable contribution to the university's

mission and the experience of other students. *Cf. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-89 (2007) (Kennedy, J., concurring) (distinguishing "race-conscious measures to address" the issue of diversity from "treating each student in different fashion solely on the basis of a systematic, individual typing by race").

Admissions officers at amici universities consider a wide range of information that provides them a sense of the student as an individual. Each of amici universities has an admissions process that provides "truly individualized consideration" of its applicants. *Grutter*, 539 U.S. at 334. By way of example, all applicants to amicus Case Western Reserve University must submit the "Common Application" (which includes a personal essay and a list of extracurricular and work activities), an official high school transcript, a secondary school report (including a guidance counselor recommendation), an SAT or ACT score, and two teacher recommendations. Applicants may supplement their applications with additional letters of recommendation, SAT II subject test scores, and an interview with a Case Western Reserve admissions counselor. If an applicant did not follow a traditional path to college, amicus Case Western Reserve provides supplementary application instructions for transfer, international, and home-schooled students.[23] Increasingly, amici use online resources to allow applicants an opportunity to express their individual potential to contribute to academic and extra-curricular life. At amicus

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[23] Case Western Reserve University, *Undergraduate Admission: Application and Checklist*, http://admission.case.edu/apply/applicationinstructions.aspx (last visited Oct. 29, 2015).

University of Rochester, an applicant can submit "electronic media," including links to music, websites, photos and online videos.[24]

Admissions officers at amici universities conduct a painstaking review of everything submitted with an application, and expend substantial time and considerable expense in order to understand the applicant and how the individual would contribute to the university. At amicus George Washington University, for example, "[e]very completed application is carefully reviewed by the Admissions Committee, which looks for students who have the academic preparation, personal qualities and motivation to thrive in GW's dynamic environment."[25] Under such a system, "individual assessment is safeguarded through the entire process." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting).

Amici strive to create a diverse and dynamic learning environment both at the university-wide level and within the various academic disciplines and programs, as set forth in greater detail in Point I.D, *infra*. In contrast to Petitioner, who measures diversity only through aggregate numbers of minorities at the university level, amici recognize that intensive interaction and exchange of ideas takes place both within academic disciplines and outside of the classroom environment. Thus, it is critical that

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[24] University of Rochester, *Apply to Rochester*, http://enrollment.rochester.edu/apply/freshmen/ (last visited Oct. 29, 2015).

[25] George Washington University, *Freshman Admission*, http://undergraduate.admissions.gwu.edu/freshman-admission (last visited Oct. 29, 2015).

diversity is not compartmentalized within a few departments or subjects, but rather is spread throughout the university's programs and environments such that students can benefit from meeting and working with other individuals whose backgrounds, talents, life experience, beliefs, and world views differ from (and thereby challenge) their own. In order to facilitate this vigorous exchange, amici seek to admit a diverse group of students, including sufficient numbers of underrepresented minority students to reduce the feeling of isolation and permit these diverse voices to be heard. This diversity enriches the experience of all students in the programs. Without it, students' educations would be narrowed, and they would graduate into a heterogeneous and international economy without the tools to succeed.

D. Private Universities Have A Compelling Interest In Diversity Throughout Their Academic Programs, Including Science And Technology Fields In Which Certain Minority Groups Are Particularly Underrepresented

In addition to crafting a diverse student body in the university as a whole, private research universities like amici have a compelling interest in fostering qualitative, substantive diversity within individual academic programs and their classes, as well as in other areas of the university community where students may live or interact. In a diverse classroom, "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Grutter*, 539 U.S. at 330. Studies have

shown that heterogeneous groups are able to achieve greater insight in class discussions than homogeneous groups.[26] The heart of a student's academic experience and intellectual exchange is centered around classes in his or her academic program and interactions with peers and faculty. A university with a student body that is merely numerically diverse, or even diverse in the aggregate, may nonetheless fail to achieve the benefits of this exchange if the diversity is not marbled throughout the university's academic programs.

The benefits of diversity extend to all disciplines, including the hard sciences and engineering. As a leading physicist noted, "[a]lthough there may be one answer to a physics, chemistry or mathematics problem (based on the current state of knowledge), there are often multiple paths for arriving at that answer. In a broadly diverse classroom, all students thus benefit from hearing the different questions posed in the educational arena."[27]

Questions and problems in the fields of science, technology, engineering, and math ("STEM fields") that once seemed insoluble often have been answered or unraveled by approaching old problems in a new way or from a fresh perspective. The creativity that is essential to research in STEM fields is enhanced

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[26] Anthony Lising Antoni, et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 Psychol. Sci. 507, 507-10 (2004).

[27] S. James Gates, Jr., *Thoughts On Creativity, Diversity and Innovation in Science and Education* 3, 4 (2009), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.183.3836&rep=rep1&type=pdf (last visited Oct. 29, 2015).

through the exchange of diverse perspectives from students of different backgrounds. Exposure to different perspectives can influence both how students approach a problem and what problems they will tackle, such as diseases that disproportionately affect a particular group. Thus, diversity is critical to "the development of innovation in the thinking of students in addition to enhancing each student's mastery of existing science."[28]

While universities' core interest is the educational diversity within their campuses, a quality education also requires that universities provide their students with the tools needed to prosper in their chosen fields. A qualitatively diverse educational environment is also critical to students' continued success in STEM fields after graduation. STEM fields increasingly require international collaboration. A diverse STEM academic program is essential for students who inevitably will be required to work with a diverse group of colleagues on international teams, and seek global funding and business opportunities.

Universities have a particular interest in pursuing and enhancing qualitative diversity in STEM fields, in which certain minority groups are distinctly underrepresented. According to one study, underrepresented minorities ("URMs"), which include individuals who self-identified as African-American, Hispanic, or Native American/Alaska Native, comprise just 11% of those who are employed in STEM occupations, which is only one-third of their representation in the school-age population (*i.e.*,

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[28] *Ibid.*

33%).[29] This underrepresentation is even more pronounced among the newest entrants to those fields. Even though the number and proportion of doctoral degrees in STEM fields awarded to underrepresented minorities increased in both number and proportion from 2000 to 2009, African-Americans, Hispanics, and American Indians/Alaska Natives still accounted for only 7% of all STEM doctoral degrees awarded during that period.[30] Ultimately, this problem manifests in the STEM workforce. The National Science Foundation recently found that African-Americans, Hispanics, and American Indians/Alaska Natives continue to be underrepresented in STEM fields compared with their proportions in the U.S. population.[31]

The failure to attract URMs to study in STEM fields threatens the nation's economic well-being and strength. "[STEM] workers drive our nation's innovation and competitiveness by generating new

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[29] Lisa Tsui, *Effective Strategies to Increase Diversity in STEM Fields: A Review of the Research Literature*, 76 J. Negro Educ. 555 (2007).

[30] National Science Board, *Science and Engineering Indicators 2012, ch. 2-16, Undergraduate Education, Enrollment, and Degrees in the United States, available at* http://www.nsf.gov/statistics/seind12/pdf/seind12.pdf (last visited Oct. 29, 2015).

[31] National Science Foundation, *Diversity in Science and Engineering Employment in Industry* (Mar. 2012), *available at* http://www.nsf.gov/statistics/infbrief/nsf12311/nsf12311.pdf (last visited Oct. 29, 2015).

ideas, new companies, and new industries."[32] Yet there is an inadequate "supply and availability of STEM workers,"[33] because "the U.S. education system too frequently fails to identify and develop our most talented and motivated students who will become the next generation of innovators."[34] It is therefore critical to the future economic strength of our country that we "extend STEM educational and career opportunities to women and minority groups that are underrepresented in these areas, so that all Americans can find quality jobs and lead our innovative economy in the decades ahead."[35] Indeed, as noted in a recent National Security Strategy, "America's long-term leadership depends on educating and producing future scientists and innovators" and to do so we must "expand STEM

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[32] David Langdon, et al., U.S. Department of Commerce, *STEM: Good Jobs Now and for the Future* 1 (2011), http://www.esa.doc.gov/reports/stem-good-jobs-now-and-future (last visited Oct. 29, 2015).

[33] *Ibid.*

[34] National Science Board, *Preparing the Next Generation of STEM Innovators: Identifying and Developing Our Nation's Human Capital* 5 (2010), *available at* http://www.nsf.gov/nsb/publications/2010/nsb1033.pdf (last visited Oct. 29, 2015).

[35] National Economic Council, et al., *A Strategy for American Innovation* 15 (2011), *available at* https://www.whitehouse.gov/sites/default/files/uploads/InnovationStrategy.pdf (last visited Oct. 29, 2015).

education and career opportunities for underrepresented groups."[36]

The lack of diversity in STEM fields threatens, however, to become a self-perpetuating crisis for the entire nation. At the very time we most need the talents of all our most gifted science students, underrepresented minority students are avoiding, or even leaving, STEM fields. URMs disproportionately leave the college science pipeline because of a lack of "academic and social integration."[37] Among other factors, the lack of "support from other minorities" and a feeling of being "academically and socially isolated," which is "more prevalent within STEM," contributes to the departure of minority students from STEM fields.[38] In other words, a lack of substantive, qualitative diversity within STEM academic programs serves as a self-reinforcing barrier to entry or continuance in those programs by URM students.

Private universities like amici, which have a strong research emphasis, therefore have a compelling interest in selecting and retaining a diverse student body throughout their academic programs, particularly in STEM fields. While Petitioner urges the Court to conclude that the pursuit of qualitative

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[36] Obama Administration, *National Security Strategy* 9, 29 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (last visited Oct. 29, 2015).

[37] National Academy of Sciences, et al., *Expanding Underrepresented Minority Participation* 130 (2011), *available at* https://grants.nih.gov/training/minority_participation.pdf (last visited Oct. 29, 2015).

[38] *Ibid.* at 133-134.

diversity is not a "'clearly identified' educational goal" susceptible to narrow tailoring,[39] the lack of success in retaining URMs in the STEM fields demonstrates that even greater attention must be given to achieving sufficient diversity within STEM programs at universities to end the feeling of academic and social isolation that currently exists.[40] Without such efforts the universities—and society at large—will lose the benefit of these budding scientists and engineers.[41]

E. Solutions That Have Been Implemented By Public Institutions Are Not Feasible For Amici, Which Are Selective Schools With Smaller Entering Classes That Are Drawn From All Over The Country And Around The World

Which race-neutral alternatives may be an option depends on the nature of the institution and the program. For instance, race-neutral alternatives that could be explored and might be workable as a means for enhancing educational diversity at some schools may be wholly impracticable at smaller, private universities. Amici draw students from across the nation and foreign countries, as opposed to many state schools and community colleges, and enroll only a few if any students from most localities. Additionally,

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[39] Pet. Br. 29 (citation omitted).

[40] Mitchell J. Chang, Sylvia Hurtado, et al, "What Matters in College for Retaining Aspiring Scientists and Engineers From Underrepresented Racial Groups," Journal of Research in Science Teaching, Vol. 51, No. 5, 555-580 (May 2014) (proposing initiatives for individual institutions to improve science achievement for URMs).

[41] *Ibid.*

amici receive applications from many more qualified applicants that they can accommodate. For example, in 2014, more than 17,700 students applied for admission to amicus Rice University, whose first-year undergraduate class consists of less than 1,000 students.[42] Similarly, amicus Caltech received more than 6,500 total applications for the class of 2019, but enrolled 241 students for an admission rate of 9%.[43] The competitiveness of amici's respective applicant pools, combined with their relatively small size—amici generally enroll, at most, a few hundred or a few thousand undergraduates each year, as compared to the 39,523 enrolled as undergraduates at UT Austin in 2014[44]—prohibit a percent-based plan similar to that implemented by the Texas legislature. Smaller universities and colleges like amici could not possibly accommodate the top 10%, or even the top 1% of students of all graduating high school classes without losing their distinctive characters. The small size of private universities does not allow them to extend a blanket offer to students based on their high school class rank, and to do so would require sacrificing amici's mission of providing a top quality education to a purposefully small but diverse student body. Because the student bodies are smaller in private

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[42] Rice University, "Rice Applications Set a Record," *available at* http://news.rice.edu/2014/02/27/rice-applications-set-a-record-2 (last visited Oct. 29, 2015).

[43] Caltech, *Class Profile, Class of 2019 by the Numbers*, https://www.admissions.caltech.edu/content/class-profile (last visited Oct. 29, 2015).

[44] University of Texas at Austin, *Facts & Figures*, available at https://www.utexas.edu/about/facts-and-figures (last visited Oct. 29, 2015).

universities like amici, reliance on purely numeric selection criteria would compromise the ability of amici to create diversity at the level of the individual, and render that diversity the product of mere happenstance. For educational institutions in amici's respective positions, only individualized consideration of all factors, including race, allows educators to select a student body that is truly diverse and contributes to the fulfillment of the university's academic mission.

Finally, reliance on purely numeric criteria is not only infeasible; it would fundamentally threaten the ability of universities and their admissions offices to build a community of students and scholars, which is a more effective educational environment than one generated by rote statistics. Amici place an enormous amount of effort in crafting a unique environment for their students, where the educational experience both inside and outside of the classrooms is as mind-expanding as possible. As amicus Emory University has explained, the goal of its admissions officers and staff is to "shape the strongest possible freshman class by admitting students who are genuinely right for Emory, and for whom Emory is the right place."[45] Amicus George Washington University similarly seeks to "create a class of students who will pursue academic excellence, thrive in our dynamic environment, and make lasting contributions to GW

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[45] Emory Magazine, "Shaping a Freshman Class," *available at* http://www.emory.edu/EMORY_MAGAZINE/issues/2014/autumn/features/freshman.html (last visited Oct. 29, 2015).

and the world."[46] At amicus Case Western Reserve University, diversity within a student body is important because it helps to create a "culture of inclusion that encourages relationships and interactions among people of different backgrounds, a culture that enhances human dignity, actively diminishes prejudice and discrimination and improves the quality of life for everyone in our community."[47] Amicus Rice University focuses the goal of its admission process on "craft[ing] a residential community that fosters creative, intercultural interactions among students, a place where prejudices of all sorts are confronted squarely and dispelled."[48] Amicus Tulane University's commitment to diversity "focuses specifically on fostering greater diversity, equity, inclusion, and accountability at every level of university life. The central premise at Tulane is to intentionally integrate diversity efforts into the core aspects of the institution to maximize success as a Carnegie-designated Research University (very high research activity)."[49]

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[46] George Washington University, *Undergraduate Admissions & Aid, Admissions Philosophy*, http://undergraduate.admissions.gwu.edu/inside-admissions (last visited Oct. 29, 2015).

[47] Case Western Reserve University, *The University Diversity Statement*, https://students.case.edu/multicultural/resources/oncampus.html (last visited Oct. 29, 2015).

[48] Rice University, *Undergraduate Admission, Philosophy and Evaluation*, https://futureowls.rice.edu/futureowls/Philosophy_and_Evaluation.asp (last visited Oct. 29, 2015).

[49] Tulane University, *Tulane's Diversity and Inclusive Excellence Statement*, https://tulane.edu/equity/diversity-statement.cfm (last visited Oct. 29, 2015).

Diversity helps amici to achieve their educational goals and to prepare their students for success beyond the university. Being precluded from conducting holistic review in which race is one of many factors will interfere with amici's core missions as educational institutions.

F. The Inability To Consider Race As One Factor Among Many Would Prevent Educational Institutions From Effectively Addressing The Way Race Matters For Students

It is an understatement to say that the issue of race remains a politically charged but critical subject in the United States. Past Court precedent in the area of diversity in education candidly recognizes this, and as the Fifth Circuit wrote on remand, "*Bakke* accepts that skin color matters—it disadvantages and ought not be relevant *but it is.*" *Fisher v. University of Texas at Austin*, 758 F.3d 633, 657 (5th Cir. 2014) (emphasis added); *see also Grutter*, 539 U.S. at 333 (diminishing stereotypes can be a crucial part of a school's educational mission "in a society, like our own, in which race unfortunately still matters"). Petitioner's proposed diversity methodology, which relies solely on rigid numerical goals, incorporates the pernicious assumption that all people of a given race are, essentially, interchangeable, and threatens the quality of education that amici and similarly situated institutions strive to offer. Amici's holistic review is based on the principle that truly valuable diversity emphasizes quality over quantity and substance over form.

II.

THE COURT'S PRIOR RULINGS SUPPORT AMICI'S HOLISTIC ADMISSIONS POLICIES AND ENABLE PRIVATE UNIVERSITIES TO FOSTER STUDENT BODY DIVERSITY

In *Bakke*, Justice Powell unequivocally confirmed that the interest in educational benefits that flow from the creation of a diverse student body at academic institutions—including enhanced classroom dialogue and the lessening of racial isolation and stereotyping—is a compelling interest that may permissibly justify the consideration of race. 438 U.S. at 307-09. In *Grutter*, Justice O'Connor's majority opinion reaffirmed *Bakke's* holding that an admissions program that is narrowly tailored in order to achieve diversity in educational settings serves a compelling interest, so long as the program "does not insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants," and emphasized that educational diversity causes "racial stereotypes to lose their force," to the benefit of all students. 539 U.S. at 319-20, 334, 343. In this very case, the Court reaffirmed the compelling interest that educational institutions have in creating a diverse student body, even as it remanded the case to the Fifth Circuit for strict scrutiny review of UT Austin's holistic admissions plan. *Fisher I*, 133 S. Ct. at 2419. The Court instructed that admissions processes "must 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" *Id.* at 2420 (quoting *Grutter*, 539 U.S. at 337).

Here, it is amici's treatment of each potential student as a full-fledged individual that fulfills the twin goals of passing Constitutional muster and producing a substantively and qualitatively diverse and pluralistic student body that advances amici's educational mission. At UT Austin as well as at amici, race-neutral methods alone have not produced the level of substantive educational diversity required to meet the schools' educational goals. As the Fifth Circuit found on remand, the "sad truth" of the Percent Plan at UT Austin is that it "increase[s] minorities in the mix, while ignoring contributions to diversity beyond race." *Fisher v. University of Texas at Austin*, 758 F.3d 633, 650-51 (5th Cir. 2014). But, "[d]iversity is a composite of the backgrounds, experiences, achievements, and hardships to which race only contributes." *Id.* at 634. Moreover, the Fifth Circuit closely examined the record and UT Austin's race-neutral efforts of implementing scholarship programs, outreach and recruitment efforts, counseling programs, and other actions aimed at educating potential low income students about the financial support available for higher education. The Fifth Circuit concluded that these efforts resulted in only modest gains but ultimately stagnated minority representation in the student body. Rather than moving towards a critical mass of minority students, UT Austin's race-neutral efforts did little to advance the critical mass needed to fully realize the educational benefits of diversity. *Id.* at 649.

This was the experience of amicus Rice University, too, for example. As a result of Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), and prior to the Court's decision in *Grutter*, Rice

implemented a number of alternatives to considering race as a factor in admissions, including revising its admissions guidelines to include, in addition to standardized test scores and traditional numeric indicators, consideration of many other factors, such as: an applicant's potential contributions and interactions that will enrich the educational experience of all students; geographic, socioeconomic, and cultural origins; applicants whose parents did not attend college; challenges applicant faced in life; succeeding academically in an environment relatively indifferent to intellectual achievement; and characteristics that will contribute to a residential community that fosters creative, inter-cultural interactions and provides a place to confront and dispel prejudices.

A review of these and other efforts by Rice conducted by the Office for Civil Rights for the U.S. Department of Education concluded that Rice had conducted a serious, good faith and comprehensive review of workable race-neutral alternatives before "it determined, post-*Grutter*," that it needed to include race and national origin with the many race-neutral factors that it already was using in its admissions process in order to achieve educational diversity.[50]

Due in no small part to the failure of exclusively race-neutral evaluation, the Fifth Circuit properly concluded that UT Austin's holistic review program "was a necessary and enabling component of the

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[50] *See* U.S. Department of Education, Office for Civil Rights, *Compliance Resolution*, Rice University, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/06052020-a.html (last visited Oct. 29, 2015).

[Percent Plan] by allowing [the University] to reach a pool of minority and non-minority students with records of personal achievement, higher average test scores or other unique skills." *Fisher v. University of Texas at Austin*, 758 F.3d 633, 653 (5th Cir. 2014) ("a significant number of students excelling in high-performing schools are passed over by the [Percent Plan] although they could bring a perspective not captured by admissions along the sole dimension of class rank"). The "holistic review is a necessary complement to the [Percent Plan], enabling it to operate without reducing itself to a cover for a quota system; that in doing so, its limited use of race is narrowly tailored to this role—as small a part as possible for the Plan to succeed." *Id.* at 654.

The ability of an educational institution to make this sort of careful and informed evaluation of potential students is particularly important to private universities like amici. As schools with entering classes far smaller than those at UT Austin, the only way for amici to achieve a student body that is diverse across academic, socio-economic, cultural, racial and experiential lines is to approach each candidate as an individual, and apply a holistic and individual review that balances the potential contributions of that candidate with the diversity of the student body as a whole. Excluding race as a factor among many factors will severely undermine and compromise amici's ability to educate and prepare their students for an increasingly globalized world where race continues to matter.

CONCLUSION

Amici respectfully submit that, for all of the foregoing reasons, this Court should affirm the Fifth Circuit's judgment that the University of Texas' holistic admissions policy satisfies the Court's strict scrutiny requirements.

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